

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

TRANSCRIPT OF MOTION HEARING PROCEEDINGS

(Viz Zoom Conference)

BEFORE THE HONORABLE IVAN D. DAVIS,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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FRIDAY AFTERNOON SESSION, DECEMBER 4, 2020

1 (2:45 p.m.)

2 THE COURTROOM CLERK: The Court calls Civil Action
3 19-cv-1570, *Maglula, Ltd. versus Amazon.com, Inc.*

4 May we have counsel starting with the plaintiff, please.

5 MS. SMITH: Good afternoon, Your Honor. Morgan Smith on
6 behalf of Maglula. Here with me as well is Jeff Berkowitz, Dave
7 Mroz and Jency Matthew. We're all from Finnegan.

8 THE COURT: Good afternoon.

9 MS. STEMPLER: Good afternoon, Your Honor. Laurie
10 Stempler from Desmarais, LLP on behalf of Amazon, and with me
11 today is Justin Wilcox.

12 THE COURT: Good afternoon. This matter is before the
13 Court for -- the Court doesn't know why, but let's just start
14 from a logistical standpoint. Maybe I haven't made it clear. We
15 don't conduct business in the Alexandria Division of the Eastern
16 District of Virginia via letter. You want relief on some type of
17 action from the Court, you file a motion, period. The Court will
18 not consider anymore letters filed by either party. The length
19 of time it took you to write the letter, you could have just put
20 the exact same information in motion format.

21 MS. SMITH: Understood.

22 THE COURT: Now, what's the problem?

23 MS. SMITH: Well, Your Honor, we're here today to seek a
24 brief extension of the close of fact discovery for up until this

1 coming Wednesday -- it's currently set to close today -- for
2 ongoing issues that we're having with the inspections and
3 Amazon's discovery deficiencies, including failure to produce
4 documents and produce a witness to testify about those documents.

5 I would like to start with the inspection process and
6 going back to the Court's hearing on Monday where you said,
7 again, that it was unacceptable for Amazon to collect the
8 products in advance of our inspections, and Mr. Desmarais said,
9 You told us not to do that and we're not going to do that.

10 Now, Amazon did that anyway and has done it more than one
11 time. Now, I supervised the inspection that happened on December
12 2nd, which was the first inspection after that hearing. It
13 happened at Amazon's OAK4 facility, which is located in Tracy,
14 California.

15 We selected the OAK4 facility knowing that Your Honor did
16 not want anymore inspections if we found what we were looking for
17 at an inspection. Amazon represented to us that at the OAK4
18 facilities, [REDACTED]
19 [REDACTED], and we chose to proceed with the inspection of OAK4 in
20 light of that representation.

21 We came prepared to observe and document the pick. Upon
22 arrival, we learned that the units had all been picked and that
23 the pick was actually completed on Saturday, November 28th.

24 We, at that point -- I observed the units where they were
25 stored, [REDACTED]. [REDACTED]

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4 And at that point I observed, among other things, that

5 the --

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11 So, at that point, I worked with counsel for Amazon who
12 was present and then an Amazon employee to observe

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Now, at that point, I learned that the information
available was

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1 [REDACTED]

2 [REDACTED] At that point, I -- we decided to have the units

3 transported to a conference room that had been made available

4 from Maglula so we could inspect the units that had been

5 collected. That was part of the plan, and given that these units

6 had been collected, we basically rearranged our expectations and

7 proceeded with what we could do and accomplish at this

8 inspection.

9 For the most part, the transfer of the units to Maglula's

10 conference room occurred without incident. Some of these totes

11 were spilled upon bringing them to the conference room, at which

12 point several units fell onto the warehouse floor. Amazon

13 employees were throwing them back in the bins that had -- the

14 totes that had spilled, again compromising the information that

15 they were able to provide on a tote-by-tote basis.

16 And once the totes were in the conference room, we worked

17 with Amazon employees and counsel to get the data, again, that we

18 requested per our plan, the ASIN, the FNSKU, and the FCSKU for

19 these units for each tote.

20 We proceeded with inspecting the units, as per our plan,

21 and then about 8:00 p.m. I was informed that two more of our

22 units had been found on the warehouse floor, and that I could

23 observe -- they could arrange for a process to be configured such

24 that we could see what we've been referring to as a "pick" of

25 these units.

1 About an hour later, my colleague then took the -- one of
2 Amazon's -- one of Maglula's investigators was able to observe a
3 pick of these two units along with an Amazon employee and counsel
4 for Amazon. We inspected these units. We took a brief tour of
5 the warehouse and concluded our inspection at about 10:45 p.m.

6 Now, a series of issues have come up in the inspections in
7 Lexington and Baltimore, again because units had been pre-picked.
8 And so in Lexington, they were laid out already in a conference
9 room with tables and pieces of paper. In Maryland, some of the
10 units had been picked; we were able to observe a -- basically a
11 system override pick that is not in the ordinary course of
12 business, and so that's where we are on the inspections right
13 now, Your Honor, is that we have not seen a warehouse that they
14 have not gathered at least some or all of the units before we
15 have gotten there.

16 THE COURT: Why?

17 MS. STEMPLER: Your Honor, this is Laurie Stempler. First
18 of all, I just want to make the point that we -- there were units
19 that were not picked that Maglula had a chance to observe.

20 With respect to the OAK4 facility, on November 27th, after
21 the Court order came down, Amazon did instruct its fulfilment
22 centers to halt the process, the picking process, and they did.

23 On Sunday morning following that day, we then conferred
24 with Maglula's counsel and we relied on data that we had that we
25 thought accurately was up-to-date reflecting the status of the

1 picks in the fulfilment center, and we shared that data in good
2 faith with Maglula's counsel. Unfortunately, that data was not
3 up-to-date, and that is why on Sunday we relayed to them that
4 there were still [REDACTED] that had not been picked when, in
5 fact, they had.

6 We offered to allow Maglula to observe the units being
7 replaced back into inventory and then watch the pick from start.
8 They declined to do that. But at the other fulfilment centers,
9 Maglula has been able to watch over [REDACTED] get picked.

10 THE COURT: Well, what's the problem? What am I here to
11 resolve?

12 MS. SMITH: From Maglula's perspective, Your Honor, since
13 discovery is closing today, we are seeking an extension until
14 Wednesday to address the inspection issue, observe a pick at a
15 facility that has not been previously picked.

16 THE COURT: Well, she just represented that you've had
17 that opportunity.

18 MS. SMITH: We have not, Your Honor. At OAK4, it was
19 picked; at Lexington, it was picked; At BWI, many of the units
20 had already been picked before we got there.

21 THE COURT: So, let's start again. Counsel for Amazon,
22 you just represented that they had an opportunity to observe
23 units that had not been picked.

24 MS. STEMPLER: That's correct, at BWI, Your Honor, in
25 Maryland.

1 THE COURT: Is that true, counsel for Maglula?

2 MS. SMITH: Yes, it is true. However --

3 THE COURT: The answer to the question was wrong. You
4 said you did not have any opportunity to observe any units that
5 had not been picked. That was not an accurate representation.

6 MS. SMITH: And so the BWI pick, Your Honor -- I would
7 like to explain again that that pick was done in a preprogrammed
8 fashion that was in a system override to allow that to happen.

9 THE COURT: They said they gave you an opportunity. They
10 said they put everything back on the shelves, and you would be
11 able to observe them re-pick, and you said no.

12 MS. SMITH: So, at the OAK4 facility --

13 THE COURT: That's a yes or a no. Is this the same
14 facility that they offered and said we will put everything back
15 and give you an opportunity to inspect just us picking it up off
16 the shelf?

17 MS. SMITH: No, it is not.

18 THE COURT: Well, which facility was that?

19 THE SMITH: That was at OAK4.

20 THE COURT: And why did you say no?

21 THE SMITH: So, again, this is why I observed the
22 {indiscernible} that Amazon had on [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 THE COURT: Well, how do you know that? Simply because
2 that information wasn't in the barcode on the box doesn't mean
3 that someone may not have had that information in their
4 possession and could have accurately put the products back in the
5 bin from which they came. That was an assumption.

6 THE SMITH: Your Honor, at the time of the --

7 THE COURT: You were offered the opportunity to say, Well,
8 let's see; since the information from the bin information doesn't
9 appear on the barcode, let's see how you can put it back in the
10 bins, since that information isn't on the barcode. And then once
11 you start observing them, say -- Well, the first question will
12 be, Well, that came out of that box and that box's barcode didn't
13 have a bin, but you're placing it in that bin, why are you
14 placing it in that bin if the box from which it came, the barcode
15 didn't have a bin number on it? How do you know it came from
16 that bin? That should have been the process that took place.
17 And then they would have given you an answer that was either
18 acceptable or not acceptable.

19 THE SMITH: Again, the issue is, Your Honor, that the
20 [REDACTED]

21 [REDACTED], and so --

22 THE COURT: Some of the barcodes had more information than
23 others. That doesn't mean that they didn't -- someone there
24 didn't know what bin the products that were in the totes came
25 from. That's an assumption. You could have observed the

1 process, and either your assumption would have been validated or
2 not. But we don't file requests for relief from the Court until
3 your assumption or speculation or hypothesis has been validated.
4 That's the process.

5 THE SMITH: I was saying, Your Honor, that --

6 THE COURT: This is exactly why we need an extension of
7 discovery, because we've wasted time in inspecting by not giving
8 them an opportunity to do what they said would have rectified
9 your concerns about the process.

10 THE SMITH: Your Honor, again --

11 THE COURT: If they gave you the opportunity, and what
12 they did did not result in a satisfactory inspection, then you
13 bring the issue to the Court; not until. And when you bring it
14 to the Court, you bring it in a motion fashion supported by
15 memorandum pursuant to the local rules of this Court, not in
16 letter fashion. It seems simple to the Court.

17 So, what, besides a, as you consider it, a modest
18 extension of discovery are you looking for besides that? Because
19 if the parties aren't on the same page yet, that modest extension
20 of discovery is going to be irrelevant, if you continue to run
21 into problems during the inspection process, because then you
22 still wouldn't have gotten what you wanted and would be seeking
23 another modest extension of discovery.

24 THE SMITH: With respect to the inspections, Your Honor,
25 we have -- we had discussions with Amazon's counsel last night

1 when, for the first time, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] We learned that for the first time last night. We
5 have since communicated to Amazon that that is the process that
6 we would like to observe at a facility that has not been picked
7 in violation of the Court's order. That was what we have been
8 working towards.

9 THE COURT: It has been picked, so what do you mean?

10 THE SMITH: No. So, my understanding, again, of [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] So the issue

19 that counsel for Amazon and I have been discussing --

20 THE COURT: -- from a bin, correct?

21 THE SMITH: I'm sorry?

22 THE COURT: They bring the items from a bin.

23 THE SMITH: [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 THE COURT: What is [REDACTED] ? All we've been
2 talking about is bins and totes.

3 THE SMITH: [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 THE COURT: [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 THE SMITH: Correct. [REDACTED]

10 [REDACTED]

11 THE COURT: I hate to say it, Amazon, but that just
12 appears quite insufficient.

13 MS. STEMPLER: [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 THE COURT: [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 MS. STEMPLER: Perhaps, but this is how --

21 THE COURT: That's why you all get paid the big money.

22 So, let's move on to what else besides, once again, you discussed
23 with Maglula. I'm somewhat concerned, Amazon, about this
24 discussion of [REDACTED] and all of this, which they just heard
25 for the first time last night, which I am just hearing for the

1 first time after 3:00 on Friday, when we had a discussion on
2 Monday about how this process was going to work starting Tuesday.

3 MS. STEMPLER: So, Maglula had said to us on the phone
4 last night, we want to see it in the ordinary course of
5 business -- a pick in the ordinary course of business -- they
6 were very insistent -- and that was not in the original list of
7 requests that they made.

8 We determined -- we called the Maryland facility, and we
9 asked if there was something that was as close as possible to an
10 ordinary course of business. There were still [REDACTED] that had
11 not yet been picked, and we learned that [REDACTED].
12 And, as Ms. Smith described, [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 THE COURT: Why is it called [REDACTED] That's just
20 what happens next. What happens next under those circumstances
21 would be under the ordinary course of business when [REDACTED]
22 [REDACTED], correct?

23 MS. STEMPLER: That is correct, that [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 [REDACTED]
2 [REDACTED], but they
3 declined.

4 THE COURT: You offered that?

5 MS. STEMPLER: Yes. They declined.

6 THE COURT: No. I mean, did you tell them that [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 MS. STEMPLER: We explained that it was the closest to
11 what a customer just randomly ordering a product on Amazon would
12 experience.

13 THE COURT: The customer doesn't experience anything, the
14 people in the warehouse do.

15 MS. STEMPLER: Yes. Excuse me, Your Honor.

16 THE COURT: [REDACTED].

17 MS. STEMPLER: I didn't word that properly. [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED].

23 THE COURT: And if it's wrong, they go get it from
24 somewhere else.

25 MS. STEMPLER: [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 THE COURT: [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 MS. STEMPLER: We did explain that to them, Your Honor. I
11 don't think I then drew that conclusion that, therefore, that is
12 the ordinary course of business, but you are correct. [REDACTED]

13 [REDACTED]

14 THE COURT: So, this case needs to move to its next phase.
15 Does Amazon concur in the request for a modest extension?

16 MS. STEMPLER: No, Your Honor. We agree that the case
17 needs to move to the next phase. We've had four inspections, the
18 fifth is happening right now, and we would like to move forward.

19 THE COURT: And we've been on the Zoom more times than
20 this Court can count with problems in the inspection process,
21 which, based on the Court's orders, seem to have been in large
22 part the result of action and/or inaction by Amazon.

23 MS. STEMPLER: Your Honor, we have bent over backwards to
24 meet Maglula's requests, including a request that had not --

25 THE COURT: I cannot concur in that representation.

1 MS. STEMPLER: Your Honor, we allowed Maglula's
2 representatives to do things that they didn't even include in
3 their requested plan, but we did that because we didn't want to
4 be in front of you again.

5 THE COURT: No one --

6 MS. STEMPLER: -- for --

7 THE COURT: -- at all for the months this process has been
8 going on has ever really sat down and met and conferred in good
9 faith, because it's several days -- today is the last day of
10 normal discovery, and we're still not on the same page of how the
11 inspection was supposed to take place. How is that possible
12 months into the discovery process? That's a rhetorical question.
13 Your meet and confers were not in good faith. That's the answer.

14 The request for modest extension of discovery is granted.
15 This Court wants to see no further letters from either party.
16 There will be no further extensions of the discovery process
17 absent extraordinary circumstances. Disagreement about how the
18 process of inspections will take place from now until that end of
19 the modest discovery will not meet the definition of
20 extraordinary circumstances, based on what this Court concludes
21 is a party's lack of desire and/or ability to meet and confer in
22 good faith.

23 Any clarifications necessary concerning the Court's
24 ruling? Maybe my voice went out. Is there any clarification --

25 MS. SMITH: Apologies, Your Honor.

1 THE COURT: -- necessary?

2 MS. SMITH: My apologies, Your Honor. My request for
3 clarification is, now that we have -- now that Maglula
4 understands [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 THE COURT: [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED] Correct? Amazon; is that correct?

13 MS. STEMPLER: It is correct that if we're truly thinking
14 about what is the ordinary course of business [REDACTED]

15 [REDACTED], so yes.

16 THE COURT: So, Maglula, you want them to show you
17 something that [REDACTED]

18 [REDACTED]?

19 MS. SMITH: Your Honor, I'm trying to sort of work through
20 the realities of this situation here, which is that Amazon says
21 that they cannot demonstrate for us [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED].

25 Now, this -- [REDACTED], again, was presented

1 in a way to deal with that fact, I guess logistical challenges
2 that Amazon says they cannot show us [REDACTED].

3 It's been represented that [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED].

11 THE COURT: [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 MS. SMITH: That's my understanding. I'll let
23 Ms. Stempler answer that one.

24 MS. STEMPLER: That is correct, Your Honor.

25 THE COURT: So what's the -- so, then, whether it's the

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 MS. SMITH: That is what has been a part of our plan,
5 observing how these units are picked in the ordinary course of
6 business. If this [REDACTED] is the way that this happens, I
7 have said to Amazon's counsel several times now that that is what
8 we will view in a facility that has not been pre-picked by
9 Amazon.

10 MS. STEMPLER: Your Honor, may I just address that point?

11 THE COURT: Which point? Because I made it clear that
12 products were not to be pre-picked. If they were pre-picked,
13 they were to be put back on the shelf so they can see the
14 original pick.

15 MS. STEMPLER: So, the point that I wanted to address is
16 that we offered that opportunity to see [REDACTED] that had not
17 been picked last night in Maryland under the [REDACTED],
18 and they said no.

19 THE COURT: Well, offer it again, and obviously they have
20 to say yes, since they just said they'll do that.

21 MS. STEMPLER: So, what I would propose is, since the
22 Jacksonville, Florida inspection has not ended, it's still very
23 much going on, that we do that with that fulfilment center.

24 THE COURT: Problem?

25 MS. SMITH: We will need -- if we're doing that, we will,

1 as we talked about earlier today, need to observe that the units
2 that were picked, the exact units go back to exactly where they
3 were before.

4 THE COURT: Problem?

5 MS. STEMPLER: That should be fine, Your Honor.

6 THE COURT: What do you mean "should be"?

7 MS. STEMPLER: Meaning that we can do that.

8 THE COURT: We will do that.

9 MS. STEMPLER: We will do that, Your Honor.

10 THE COURT: Okay. Satisfactory?

11 MS. SMITH: Based on those representations, yes. I don't
12 know that they will be able to accomplish it, but we'll observe
13 it.

14 THE COURT: See, that's why good faith meet and confers
15 deteriorate. That extra language in the beginning of the final
16 statement wasn't actually necessary. You could have just said
17 yes.

18 MS. SMITH: Yes, Your Honor.

19 THE COURT: Anything further?

20 MS. SMITH: I discussed earlier that there were several
21 Amazon discovery deficiencies that were also addressed in our
22 letter. I wanted to clarify the extension of discovery is for
23 those purposes as well.

24 THE COURT: I didn't have an opportunity to read your
25 letter. In fact, I -- I'm not really in the habit of reading

1 letters, because we deal with issues based on motions.

2 MS. SMITH: I'm happy to discuss that now, if you would
3 like, Your Honor.

4 THE COURT: You have -- the process has 11 minutes.

5 MS. SMITH: Okay. The issues that we have currently
6 outstanding, which we have identified to Amazon, are deficiencies
7 in their document production regarding financial data --

8 THE COURT: I don't care about what the deficiencies are.
9 I'm here to ask you, what do you want the Court to do about it?

10 MS. SMITH: I want to make sure that the discovery
11 extension applies to the fact that there are discovery
12 deficiencies and that --

13 THE COURT: Well, that depends on whether or not they
14 concur with you on whether there's a discovery deficiency and
15 whether this Court will concur with either you or them.

16 MS. SMITH: Okay. Then -- I would like to clarify that
17 the extension is for the deadlines that are currently set for
18 December 4th go to December 9th.

19 THE COURT: For what?

20 MS. SMITH: That includes the close of fact discovery,
21 exchange of privilege logs, the deadline to confer regarding
22 asserted claims of prior art on the patent claims, for the
23 deadlines that are currently set for today.

24 THE COURT: Well, the extension was a request to extend
25 the discovery cutoff from today until the date you asked for,

1 correct?

2 MS. SMITH: Correct.

3 THE COURT: That's what the Court granted.

4 MS. SMITH: Okay. Thank you, Your Honor.

5 THE COURT: Any further input?

6 MS. SMITH: Not from my side. Thank you, Your Honor.

7 MS. STEMPLER: Not from Amazon either, Your Honor.

8 THE COURT: All right. Well, thank you very much for your
9 participation.

10 MS. SMITH: Thank you, Your Honor.

11 (Proceedings adjourned at 3:21 p.m.)

12 C E R T I F I C A T E

14 I, Scott L. Wallace, RDR-CRR, certify that
15 the foregoing is a correct transcript from the record of
proceedings in the above-entitled matter.

16 /s/ Scott L. Wallace

17 12/4/20

18 **Scott L. Wallace, RDR, CRR**
Official Court Reporter

19 Date

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